U.S. BANKRUPTCY COURT

FOR THE DISTRICT OF ARIZONA

In re: **AHMED ABULABAN,** **Debtors.**	In Chapter 7 proceedings Case No.: 2:11-bk-18961-CGC
BARAKAT ALZUBIDI and IBRAHIM AOUN, **Plaintiffs,** **v.** **AHMED ABULABAN,** **Defendant.**	**Adv. No.: 2:11-ap-01795-CGC** **UNDER ADVISEMENT DECISION RE: PLAINTIFFS' COMPLAINT OBJECTING TO DEFENDANT'S DISCHARGE**

I. Introduction

Debtor filed for Chapter 7 bankruptcy protection on June 30, 2011. Plaintiffs, Ibrahim Aoun ("Mr. Aoun") and Barakat Alzubidi ("Mr. Alzubidi"), initiated this adversary proceeding on October 3, 2011 against Debtor requesting the entry of an order denying Debtor's discharge under sections 727(a)(2)(A), (a)(3), and (a)(4)(A) and (B). Plaintiffs' adversary proceeding is based on a business transaction which they entered into with the Debtor, and which resulted in the Plaintiffs never being re-paid their capital contribution by the Debtor[1].

[1] This decision constitutes the Court's findings of fact and conclusions of law following trial as required by Fed.R.Bankr.Proc. 7052.

II. Background & Facts

a. The Aoun-Abulaban transaction

In early 2011, Mr. Aoun loaned Debtor $1,500.00 to help him pay his rent. This transaction was a handshake deal that was never memorialized. Debtor promised Mr. Aoun that he would pay him back in a few days. Debtor approached Mr. Aoun a few weeks later with $5,000.00 and told Mr. Aoun that he wanted to enter into a business deal with Mr. Aoun. The nature of the business was to purchase vans and carpet cleaning machines, refurbish the vans and then sell them for a profit. Mr. Aoun eventually agreed to enter into the business transaction with the Debtor and took the $5,000.00, withdrawing from that amount the $1,500.00 that was owed to him by the Debtor. Mr. Aoun and the Debtor verbally agreed to split the profits 50/50. The total contribution to the business was $12,700.00, consisting of: (1) the Debtor's contribution to the business totaling $3,500.00; and (2) Mr. Aoun's contribution to the business totaling $9,200.00.

Debtor purchased a van for approximately $7,200.00, and also purchased a carpet cleaning machine. Debtor refurbished the van and the carpet cleaning machine, the total cost of the purchase and refurbish was $12,700.00. Debtor advertised and sold the van, complete with the carpet cleaning machine, to Mr. Joseph for $22,500 in February 2011. The sales amount was distributed as follows: (1) a $1,500.00 check; (2) a $1,200.00 check; and (3) $19,800.00 in cash. Mr. Aoun received both checks totaling $2,700.00. Debtor kept the remaining $19,800.00 in cash. Debtor ignored Mr. Aoun's calls seeking reimbursement of his expenses. Mr. Aoun is still owed $6,500.00, which the Debtor never repaid.

b. The Alzubidi-Abulaban transaction

Debtor and Mr. Alzubidi have known each other since 1997. Debtor asked Mr. Alzubidi for $10,000.00 to start a business venture whereby they would buy vans and carpet cleaning material, refurbish them, and sell them for a profit. Mr. Alzubidi loaned Debtor $10,000.00 on June 29, 2010 in the form of cash. Debtor and Mr. Alzubidi went on a business trip to Kentucky for business in order to purchase a van and a carpet

cleaning machine. They purchased a van and a carpet cleaning machine for approximately $3,500.00-$4,000.00. In October of 2010, Debtor promised Mr. Alzubidi that he would deposit the money in his account. This never occurred. In January 2011, Debtor told Mr. Alzubidi that he lost all the money because the broker that he was working for filed for bankruptcy.

c. Debtor's bankruptcy

Debtor filed for protection under chapter 7 of the bankruptcy code on June 30, 2011. Plaintiffs initiated this adversary proceeding on October 3, 2011 seeking to deny the Debtor a discharge based on section 727(a)(2)(A), (a)(3) and (a)(4)[2]. Debtor's amended Schedule B lists $15,450.00 in personal property consisting of checking accounts, household goods and furnishings, clothing, a computer, and a 2007 Toyota Camry. Debtor's amended Schedule F lists unsecured non-priority claims total $108,697.51, including business loans to Mr. Aoun for $9,680.00 and Mr. Alzubidi for $9,000.00. Debtor notes in his Schedule I that he is currently unemployed, but had been employed in carpet cleaning for 17 years.

In his Statement of Financial Affairs, Debtor listed that he received $678.00 and lost $ 4,754.00 from Caravan Carpet Cleaning in 2010 and 2009, respectively. He also listed that he held an interest in Caravan Carpet Cleaning from February 2007 through June 2011. Debtor has listed the following two transfers which occurred in the two years prior to the filing of his bankruptcy petition: (1) a 2006 Ford Cargo carpet cleaning van with a carpet cleaning machine for $7,000.00, which he transferred to a buyer in Vegas (subject of this litigation); and (2) a Ford Cargo van for $2,500.00 which he transferred to a buyer from Craigslist in January 2010.

In this adversary proceeding, Plaintiffs argue that the Debtor made false statements regarding his past and current income, his business and personal assets, and his employment situation with the intent to delay or defraud his creditors. Plaintiffs also

[2] This is not an action to determine that the debts owed by Debtor to Messrs. Auon and Alzubidi are non-dischargeable under Section 523 but is restricted to a claim that Debtor's discharge should be denied under Section 727.

argue that the Debtor also made false statements with respect to his involvement in lawsuits, his marital status, and his past addresses. On the other hand, Debtor denies these allegations and notes that the Plaintiff has not provided approximate dates for all of the allegations he has made against the Debtor. Thus, the issue to be decided is whether the Debtor has committed any act that warrants a denial of his discharge under sections 727(a)(2)-(4).

III. Analysis

Objections to discharge are construed liberally in favor of a debtor and strictly against those objecting to a discharge. See First Beverly Bank v. Adeeb (In re Adeeb), 787 F.2d 1339, 1342-43 (9th Cir. 1986). The party objecting to the debtor's discharge has the burden of proving, by a preponderance of the evidence, that the debtor's discharge should be denied. See Retz v. Samson (In re Retz), 606 F.3d 1189, 1196 (9th Cir. 2010); Khalil v. Developers Sur. and Indem. Co. (In re Khalil), 379 B.R. 163, 172 (B.A.P. 9th Cir. 2007). Each of the Plaintiffs' causes of actions will be discussed separately below.

a. Section 727(a)(2)(A)

Section 727(a)(2)(A) denies a debtor a discharge if the debtor, with intent to hinder, delay, or defraud a creditor transfers, removes, destroys, mutilates, or conceals his property within one year before the date of the bankruptcy petition. See 11 U.S.C. § 727(a)(2)(A). In order to prevail under section 727(a)(2), a party must show that: (1) the debtor's act occurred during the year preceding the date of the bankruptcy petition; (2) the act was done with actual intent to hinder, delay, or defraud a creditor; and (3) the act consisted of transferring, removing, mutilating, or concealing any of the debtor's property. See Hughes v. Lawson (In re Lawson), 122 F.3d 1237, 1240 (9th Cir. 1997). Actual intent can be established through circumstantial evidence or by inferences drawn from the debtor's conduct. See Adeeb, 787 F.2d at 1342-43. Plaintiffs base their section 727(a)(2)(A) argument on the fact that Debtor allegedly concealed the fact that: (1) he owned numerous carpet cleaning vans; (2) he owned numerous businesses; and (3) he

was a co-plaintiff in a civil lawsuit. These three allegations are discussed separately below.

Plaintiffs rely on a number on online ads[3] for sales of carpet cleaning vans to support their argument that the Debtor: (1) owned the vans; (2) sold the vans; and (3) concealed the ownership and sale of the vans from his bankruptcy schedules. There is insufficient evidence to support this argument. The Plaintiffs never provided any evidence that showed by a preponderance of the evidence that the Debtor held title to the vans at issue. In fact, with respect to some of the exhibits, there is doubt as to whether they are, in fact, the Debtor's online postings.

The Debtor testified that he was often the broker or middle man and was engaged in the business of finding buyers for carpet cleaning vans. This supports the fact that his number and name (or alias) would be listed on the online ads, since he would be the contact person for such van ownership. In sum, the Plaintiffs have not established, by a preponderance of the evidence, that the vans listed online were owned by the Debtor. Furthermore, even assuming that the Debtor omitted these vans from his schedules, the Plaintiffs have not established, by a preponderance of the evidence that this omission was done fraudulently.

Additionally, Plaintiffs rely on a number of business entity searches[4] which reveal that the Debtor owns a number of Arizona businesses to support their argument that: (1) Debtor concealed the ownership of these businesses and their related assets in his bankruptcy schedules. The Debtor has listed Caravan Carpet Cleaning[5] on his bankruptcy schedules. He testified that he opened Choice One Carpet Cleaning[6] about a month before filing for bankruptcy. However, Debtor testified that he opened the business solely as a "trade name" and the business did not have any assets, so that is why he did not list Choice One Carpet Cleaning in his schedules. The Plaintiffs here have not established, by a preponderance of the evidence, that the Debtor fraudulently omitted the

[3] See Exs. 5, 6, 7, 9, 13, 15.
[4] See Exs. 19, 23, 25, 27.
[5] See Ex. 27.
[6] See Ex. 23.

businesses from his schedules. While a business with no assets must still be listed in the schedules, simple omission, without fraudulent intent, does not amount to liability under section 727(a)(2)(A). Here, the Debtor is not a sophisticated businessman who is familiar with bankruptcy law, or the requirements of the bankruptcy rules.

Finally, the Plaintiffs state that the Debtor was a co-plaintiff (along with his ex-wife[7]) in a lawsuit against Ms. Wadeea for bad checks in which the Debtor and his ex-wife claimed $10,000.00 in damages. The Plaintiffs argue that because Debtor did not list this lawsuit in his bankruptcy schedules, he was concealing the assets from the lawsuit. On March 22, 2010 (which is more than a year before the date Debtor filed for bankruptcy), Debtor's ex-wife sued Ms. Wadeea for $10,000.00.[8] Debtor filed a motion for joinder as plaintiff in the lawsuit on January 19, 2011, which was granted on February 2, 2011.[9] However, on November 30, 2011 (approximately six months after the Debtor filed for bankruptcy), the state court granted the Debtor's motion to be dismissed as a plaintiff in the lawsuit.[10] The Debtor testified at trial that attorney error caused him to be joined as a party in the lawsuit, and that he was later dismissed as a plaintiff. First, the Plaintiffs have not provided any evidence that the lawsuit was ever resolved, one way or the other. Regardless of that fact, the state court already dismissed the Debtor as a plaintiff, and any resolution in his ex-wife's favor would therefore not net him any additional income. Finally, while the Debtor may have omitted the lawsuit from his schedules, the Plaintiffs have not established, by a preponderance of the evidence, that this omission was done fraudulently. In fact, the evidence at trial established that the Debtor never considered himself as a party to the lawsuit. For these reasons, the Debtor faces no liability under section 727(a)(2).

b. Section 727(a)(3)

Section 727(a)(3) denies a debtor a discharge if he has concealed, destroyed, mutilated, falsified, or failed to preserve any recorded information, including books,

[7] For the record, the Debtor and Ms. Hanna were divorced on November 11, 2006. See Ex. 46.
[8] See Ex. 41.
[9] See Exs. 43, 44.
[10] See Ex. 45.

documents, records, and papers, from which the debtor's financial condition might be ascertained, unless such act or failure to act was justified under all of the circumstances of the case. See 11 U.S.C. § 727(a)(3). In order to prevail under section 727(a)(3), a party must show: (1) that the debtor failed to maintain adequate records or concealed, destroyed, mutilated, or falsified recorded information; and (2) that such inadequate records make it impossible to ascertain the debtor's financial condition and material business transactions. See Lansdowne v. Cox (In re Cox), 41 F.3d 1294, 1296 (9th Cir. 1994). Whether the debtor intended to conceal his financial condition is irrelevant. See id. at 1297. If the predicate requirements of the section are proven, the Debtor may avoid liability by proving that the failure was justified under all of the circumstances of the case.

A debtor must produce records that are customarily kept by a person doing the same kind of business, or satisfy the bankruptcy court with adequate reasons why he was not under a duty to do so. See Meridian Bank v. Alten, 958 F.2d 1226, 1232 (3rd Cir. 1992). When determining the adequacy of records, courts consider the following factors: (1) whether a debtor was engaged in business and, if so, the complexity and volume of the business; (2) the amount of the debtor's obligations; (3) whether the debtor's failure to keep or preserve books and records was due to the debtor's fault; (4) the debtor's education, business experience and sophistication; (5) the customary business practices for record keeping in the debtor's type of business; (6) the degree of accuracy disclosed by the debtor's existing books and records; (7) the extent of any egregious conduct on the part of the debtor; and (8) the debtor's courtroom demeanor. See 4 William J. Norton, Bankruptcy Law and Practice § 86.9 (3d ed. 2012); see also Riley v. Riley (In re Riley), 305 B.R. 873, 883 (Bankr. W.D. Mo. 2004); Barristers Abstract Corp. v. Caulfield (In re Caulfield), 192 B.R. 808, 823 (Bankr. E.D.N.Y. 1996); Vandenbogart v. Minesal (In re Minesal), 81 B.R. 477, 481 (Bankr. E.D. Wis. 1988). Plaintiffs base their section 727(a)(3) arguments on the same allegations discussed above, and maintain that the Debtor's failure to disclose his ownership interest in carpet cleaning vans and businesses,

as well as his failure to disclose the fact that he was a co-plaintiff in a lawsuit made his financial condition difficult to ascertain.

As discussed above, the Plaintiffs have not established, by a preponderance of the evidence, that the Debtor in fact held title to the carpet cleaning vans and the Mitsubishi Lancer that were listed for sale online. Therefore, there can be no argument that the Debtor concealed these records to prevent an accurate representation of his financial condition from being ascertained.

The Plaintiffs also argue in their complaint that the Debtor concealed his ownership of numerous businesses to prevent an accurate representation of his financial condition from being ascertained. At trial, they maintained that the Debtor was registered as the owner of numerous businesses which were not listed in his bankruptcy petition. The Debtor has listed Caravan Carpet Cleaning in his bankruptcy schedules. Additionally, the Debtor testified at trial that he did not list Choice One Carpet Cleaning in his schedules because the business had no assets. Taking into consideration all the factors enumerated above, it is clear that the Debtor has produced records that are customarily kept by someone in his business. Here, the Debtor was running an unsophisticated business whereby he would refurbish carpet cleaning vans and sell them, as well as broker sales of other vans through laymen consumer sites such as Craigslist. While the Debtor may have had a few different entities, the testimony at trial did not establish that any lack of records satisfied the standards set forth above.

With respect to the concealment of his involvement as a co-plaintiff in a lawsuit, this argument fails as well. As discussed above, the Debtor was dismissed as a co-plaintiff in this lawsuit, albeit six months after filing for bankruptcy. Therefore, the record of this lawsuit has no impact on the Debtor's financial condition. For these reasons, the Debtor faces no liability under section 727(a)(3).

c. Section 727(a)(4)(A)

Section 727(a)(4) denies a debtor a discharge if he knowingly and fraudulently, in connection with the bankruptcy case made a false oath or account. See 11 U.S.C. §

727(a)(4)(A). In order to prevail under section 727(a)(4)(A), a party must show that: (1) the debtor made a false statement or omission; (2) regarding a material fact; and (3) did so knowingly and fraudulently. See Khalil, 379 B.R. at 172. Whether a false statement injured the creditor is irrelevant. See Duggins, 128 F.2d at 548. A fact is material if it bears a relationship to the debtor's business transactions or concerns the discovery of assets. See id. at 173. Denial of discharge under section 727(a)(4)(A) can be based on the debtor's knowingly and fraudulently omission of information from his schedules. See Duggins, 128 F.2d at 548. Plaintiffs base their section 727(a)(4)(A) and (B) argument on the allegations that the Debtor made a false statement regarding: (1) the February 2011 sale of a carpet cleaning van; (2) his ownership of numerous carpet cleaning vans and a Mitsubishi Lancer; and (3) his interest in a lawsuit. These allegations are discussed separately below.

The Plaintiffs argue that the Debtor made a false statement about the amount he received from the February 2011 sale of a carpet cleaning van[11] to Mr. Johnson. In his statement of financial affairs, the Debtor notes that he received $7,000.00 from the sale of a 2006 Ford Cargo van to a man from Las Vegas. The evidence at trial established that the man from Las Vegas was Mr. Johnson, who paid $22,000.00 for a 2006 Chevy Cargo van. A bill of sale corroborates Mr. Aoun's and Mr. Johnson's testimony. See Ex. 3. The evidence at trial also established that Mr. Aoun received at least $2,700.00 as a result of that sale in the form of two cashiers' checks. The evidence also established that Mr. Johnson paid $19,000.00 in cash, but there is insufficient evidence to conclude who actually physically took the cash.

The Plaintiffs have established, by a preponderance of the evidence, that the value received for the February 2011 van sale was $22,000.00, not $7,000.00. However, the Plaintiffs have not established, by a preponderance of the evidence, that the Debtor listed the wrong value amount fraudulently. As mentioned above, the Debtor is not a

[11] While the statement of financial affairs lists the van sold in February 2011 as a 2006 Ford while the bill of sale and testimony at trial establishes that it was a 2007 Chevy, this discrepancy is not of much importance.

sophisticated businessman who is running a sophisticated business. The van and the carpet cleaning machine cost approximately $12,500.00. It was sold for $22,000.00. This nets approximately $9,500.00 in profit. After deducting the approximately $2,700.00 that Mr. Aoun received from the sale in the form of a cashiers' check, there is approximately $6,800.00 of net profit remaining, which reasonably explains why the Debtor wrote $7,000.00 in his statement of financial affairs.

With regards to the Debtor's alleged false statement regarding the multiple vans and Mitsubishi Lancer, for the reasons mentioned above, the Plaintiffs' argument fails here as well. In sum, there is no evidence that Debtor held title to the vehicles. The evidence and testimony at trial established that the Debtor was a broker that would sell the vans. Additionally, there is no evidence that the Debtor's statement in his bankruptcy schedules were made fraudulently. With regards to the Debtor's alleged false statement about the lawsuit in which he was a co-plaintiff, the Plaintiffs' argument suffers the same fate. In sum, the evidence and trial testimony establishes that Debtor never considered himself to be a party to the lawsuit and that his motion for joinder was attorney error. The evidence also establishes that he was removed as a plaintiff in the lawsuit. Furthermore, there is no evidence that the Debtor's statement in his bankruptcy schedules was made fraudulently. For these reasons, the Debtor faces no liability under section 727(a)(4).

IV. Conclusion

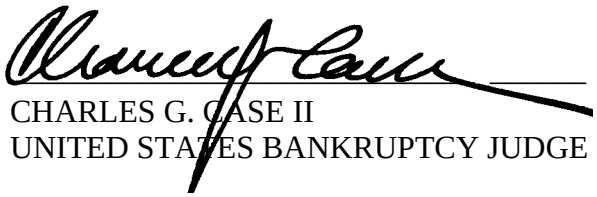
For the reasons mentioned above, the Plaintiffs have failed to prove, by a preponderance of the evidence, that the Debtor has committed an act that would support denial of his discharge under sections 727(a)(2)-(4)[12].

Counsel for Defendant are to submit a form of judgment.

So ordered.

[12] The Plaintiffs tried this case *pro se*, without the assistance of counsel, and did a very credible job under those circumstances. This decision is not based upon a failure adequately to prosecute this matter but rather upon failure to satisfy the applicable burden of proof and statutory elements.

Dated: November 3, 2012.



CHARLES G. CASE II
UNITED STATES BANKRUPTCY JUDGE

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all interested creditors and parties.